Standard Chartered Bank v Kuala Lumpur Landmark Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S7-31-3903-88
LIM BENG CHOON J
5 DECEMBER 1990

Contract — Frustration — Performance of agreement rendered impossible due to supervening act — Test of frustration — Whether agreement was frustrated — Contracts Act 1950, s 57(2)

Contract — Waiver — Agreement concluded after legal proceedings commenced — Agreement not wholly performed — Whether right to proceed with legal action is waived

Contract — Repudiation — Agreement concluded after legal proceedings commenced — Agreement not wholly performed — Whether continuing legal action amounts to repudiation of agreement

In February 1986, the plaintiff loaned $20m to a third party, and the defendant company charged certain lands to the plaintiff to secure repayment of the loan. After the third party defaulted in making payment of the loan and interest, the plaintiff commenced legal proceedings in 1988, and applied for an order of sale of the charged lands under the National Land Code 1965 to satisfy the debt due. On 3 June 1989, the plaintiff entered into a redemption agreement with the defendant whereby it was agreed that the defendant should pay $2m to the plaintiff, and deliver a bank guarantee providing for the payment of $18m to the plaintiff on demand on or before 2 December 1989. The plaintiffs then suspended the legal proceedings, and the defendant paid the $2m. On 1 December 1989, the plaintiff and defendant were served with an injunction obtained by Monsia Investment Pte Ltd restraining them from proceeding with, completing or in any manner whatsoever acting upon the redemption agreement. As a result the defendant could not comply with the redemption agreement and pay $18m to the plaintiff. The plaintiffs then revived and pursued their claim for foreclosure of the charged lands in court. The defendants submitted that by reason of the redemption agreement, the plaintiff was precluded from instituting an action for the foreclosure of the charged lands. Alternatively, the defendant was compelled to accept the plaintiff's conduct as an act of repudiation of the agreement, the acceptance of which was subjected to the defendant's right to institute appropriate action arising from the plaintiff's unlawful repudiation of the agreement. Further, the foreclosure proceedings were tantamount to a colourable device to circumvent the injunction order. The plaintiff denied repudiating the redemption agreement and stated that the defendant's affidavit contained a repudiation in that it evinced an intention not to be bound by the agreement. The plaintiff submitted that the injunctive order restraining the parties from acting upon the redemption agreement had frustrated the performance of the agreement. The defendant denied that the agreement had been frustrated and pointed out that the plaintiff had applied to court in another matter to set aside the agreement.

Held, allowing the plaintiff's application:

(1) It is important to bear in mind that the redemption agreement was created after the plaintiff had instituted the present action for foreclosure of the charged lands to recover the sums of money lent to a third party of which the plaintiff had secured the charged lands as security. A cursory reading of the redemption agreement shows that the plaintiff has not,by entering into the agreement, waived its rights to proceed with the foreclosure action; the redemption agreement was only intended to give breathing space for the defendant to redeem the charged lands within a specified time.

(2) Thus the defendant must comply with the terms of the redemption agreement. Although it has not been stated in the redemption agreement that time was of the essence, it is clear that from the several clauses in the agreement the plaintiff had suspended the foreclosure proceedings upon the common intention of the parties that strict compliance with the agreement was the consideration that the plaintiff relied on in not proceeding with the foreclosure. Therefore, all the terms of the agreement must be complied with within the stipulated time framework, failing which the plaintiff has the right to proceed with the foreclosure proceedings.

(3) It must also be considered whether the injunction acted to frustrate the redemption agreement, and whether the plaintiff could then proceed with foreclosure. There appear to be two main instances of frustration envisaged by s 57(2) of the Contracts Act 1950 — where a contract to do an act becomes either impossible or unlawful. The frustration should be caused by some supervening and subsequent event occurring after the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligations.

(4) The court is satisfied that because of the injunction obtained by Monsia Investments Pte Ltd restraining both the plaintiff and the defendant from acting on the redemption agreement, the agreement has been rendered impossible to perform within the terms and conditions of the agreement. The very essence of the agreement has been frustrated as the performance of the same would be a radical change of its original terms and conditions, in that the redemption agreement was intended to suspend the right of the plaintiff to institute foreclosure proceedings against the charged lands, if and only if, the defendant was able to comply with the redemption agreement within the time stipulated in the agreement. The effect of the injunctive order rendered the redemption agreement to be nugatory, and under the circumstances the right of the plaintiff to proceed with the foreclosure proceeding is no longer subject to the redemption agreement.

(5) The right of foreclosure is a statutory right emanating from ss 256 and 257 of the National Land Code 1965, which cannot be taken away from the plaintiff unless the plaintiff is precluded from exercising the right contractually. Here the contractual hindrance, namely, the redemption agreement suspending the right of the plaintiff to exercise its right of foreclosure, had been frustrated by the injunction. It follows that the plaintiff has every right to proceed with its application for an order for sale of the six parcels of charged land.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 03-129-90.]

[Bahasa Malaysia summary

Dalam Februari 1986, plaintif meminjam $20 juta kepada pihak ketiga dan syarikat defendan menggadai beberapa keping tanah kepada plaintif sebagai jaminan pembayaran balik pinjaman itu. Selepas pihak ketiga itu ingkar dalam membuat bayaran pinjaman dan faedah, plaintif memulakan prosiding undang-undang dalam 1988, dan memohon bagi suatu perintah jualan tanah-tanah yang digadai di bawah Kanun Tanah Negara 1965 untuk menjelaskan hutang yang terhutang itu. Pada 3 Jun 1989, plaintif memasuki suatu perjanjian tebusan

dengan defendan di mana adalah dijanjikan bahawa defendan sepatutnya membayar $2 juta kepada plaintif dan menyerah jaminan bank yang memperuntukkan pembayaran $18 juta itu kepada plaintif kena bayar bila dituntut, pada atau sebelum 2 Disember 1989. Kemudiannya, plaintif menggantungkan prosiding undang-undang dan defendan membayar $2 juta. Pada 1 Disember 1989, plaintif dan defendan diserah dengan suatu injunksi yang diperolehi oleh Monsia Investment Pte Ltd menahan mereka daripada meneruskan dengan, menyempurnakan atau dalam apa cara pun bertindak atas perjanjian tebusan itu. Oleh kerana itu, defendan tidak dapat mematuhi perjanjian tebusan dan membayar $18 juta kepada plaintif. Plaintif pun menghidupkan semula dan meneruskan tuntutan mereka bagi prosiding sekat-tebusan terhadap tanah-tanah yang digadai dalam mahkamah. Defendan berhujah bahawa oleh kerana perjanjian tebusan, plaintif terhalang daripada memulakan suatu tidakan bagi sekat-tebusan tanah-tanah yang digadai itu. Secara alternatif, defendan dipaksa menerima kelakuan plaintif sebagai suatu perbuatan penolakan perjanjian tersebut, dan penerimaan itu adalah tertakluk kepada hak defendan memulakan tindakan yang sewajarnya timbul daripada penolakan perjanjian plaintif yang salah di sisi undang-undang. Lagipun, prosiding sekat-tebusan adalah menjadi seperti suatu alat yang muslihat untuk mengalahkan perintah injunksi itu. Plaintif menafikan telah membubarkan perjanjian tebusan dan berkata bahawa afidavit defendan mengandungi satu penolakan kerana dalamnya ia telah menunjukkan suatu niat untuk tidak diikat oleh perjanjian. Plaintif berhujah bahawa perintah injunksi yang menyekat pihak-pihak daripada bertindak atas perjanjian tebusan telah mengecewakan pelaksanaan perjanjian itu. Defendan menafikan bahawa perjanjian itu telah dikecewakan dan menunjukkan bahawa plaintif telah memohon kepada mahkamah dalam lain perkara untuk mengenepikan perjanjian itu.

Diputuskan, membenarkan permohonan plaintif:

(1) Adalah penting diingati bahawa perjanjian tebusan diwujudkan selepas plaintif telah memulakan tindakan ini untuk sekat-tebusan terhadap tanah yang digadai bagi mendapat kembali jumlah wang yang dipinjam kepada pihak ketiga di mana plaintif mendapat tanah-tanah itu sebagai cagaran. Satu bacaan sepintas lalu perjanjian tebusan menunjukkan bahawa plaintif tidak dengan memasuki perjanjian itu melucutkan hak-haknya untuk meneruskan tindakan sekat-tebusan; perjanjian tebusan adalah diniatkan bagi memberi 'tempat bernafas' untuk defendan menebus tanah-tanah yang digadai dalam tempoh masa yang tertentu.

(2) Oleh itu, defendan mestilah mematuhi terma-terma perjanjian tebusan itu. Walaupun tidak dinyatakan dalam perjanjian tebusan bahawa masa adalah penting, adalah jelas bahawa daripada beberapa fasal dalam perjanjian, plaintif telah menggantungkan prosiding sekat-tebusan atas niat bersama pihak-pihak bahawa pematuhan tegas dengan perjanjian adalah balasan yang plaintif bergantung dalam tidak meneruskan dengan sekat-tebusan. Oleh yang demikian, semua terma-terma perjanjian mestilah dipatuhi dalam tempoh yang dinyatakan, sekiranya tidak, plaintif ada hak meneruskan dengan prosiding sekat-tebusan.

(3) Mestilah ditimbang sama ada injunksi telah bertindak untuk mengecewakan perjanjian tebusan, dan sama ada plaintif boleh meneruskan dengan sekat-tebusan. nampakya, ada dua kekecewaan yang dibayangkan oleh s 57(2) Akta Kontrak 1950 — di mana satu kontrak untuk membuat suatu perbuatan menjadi sama ada tidak mungkin atau salah di sisi undang-undang. Kekecewaan mestilah disebabkan oleh sesuatu kejadian yang muncul sebagai suatu perubahan dari gangguan pada sesuatu keadaan dan yang terkemudian terjadi selepas kontrak dibentukkan. Lagipun, ia mestilah suatu kejadian di mana penjanji tidak dapat elakkan, sebab satu kekecewaan yang didorong sendiri tidak akan melepaskan satu pihak daripada obligasinya di bawah kontrak.

(4) Mahkamah adalah puashati bahawa oleh sebab injunksi diperolehi oleh Monsia Investments Pte Ltd menyekat kedua-dua plaintif dan defendan daripada bertindak atas perjanjian tebusan, perjanjian telah dijadikan tidak mungkin dilaksanakan dalam terma-terma dan syarat perjanjian. Intisari perjanjian itu telah menjadi kecewa kerana perlaksanaannya menjadi satu pertukaran radikal terma dan syarat asalnya, kerana perjanjian tebusan adalah berniat bagi menggantungkan hak plaintif untuk memulakan prosiding sekat tebusan terhadap tanah yang digadai itu, jika dan hanya jika, defendan berupaya untuk mematuhi perjanjian tebusan dalam tempoh masa yang ditetapkan dalam perjanjian. Kesan perintah injunksi menjadikan perjanjian tebusan tidak penting lagi dan di bawah keadaan ini, hak plaintif untuk meneruskan prosiding sekat tebusan tidak lagi tertakluk kepada perjanjian tebusan.

(5) Hak sekat tebusan adalah hak statut yang ditimbulkan daripada ss 256 Kanun Tanah Negara 1965, yang tidak boleh dilucutkan daripada plaintif melainkan jika plaintif terhalang daripada menggunakan hak secara kontrak. Di sini halangan kontrak, yakni perjanjian tebusan menggantungkan hak plaintif mengguna hak sekat tebusannya telah dijadikan terkecewa oleh injunksi. Adalah diikuti bahawa plaintif mempunyai semua hak untuk meneruskan permohonannya untuk perintah jualan bagi enam parcel tanah yang digadai itu.

Cases referred to

1 *Taylor* v *Caldwell* 3 B&S 826; 122 ER 309 (refd)
2 *Robinson* v *Davidson* (1871)6 LR Exch 269 (refd)
3 *Davis Contractors Ltd* v *Fareham UDC* [1956] AC 696 (folld)
4 *Ramli bin Zakaria* v *Government of Malaysia* [1982] 2 MLJ 257 (folld)
5 *Re HEH The Nizam's Jewellery Trust* AIR 1980 SC 17 (folld)
6 *Codelfa Construction Pty Ltd* v *State Rail Authority of New South Wales* (1982) 41 ALR 367 (folld)

Legislation referred to

Contracts Act 1950 s 57(2)
National Land Code 1965 ss 256, 257

Darryl Goon for the plaintiff.
S Thilagavathy (Ms) for the defendant.

Cur Adv Vult

Lim Beng Choon: In this application made on 16 December 1988 by way of an originating summons the plaintiff is asking for an order for sale of six parcels of land belonging to the defendant held under Grant 12374 Lot No 30 Sec 45, CT 3730 Lot No 10 Sec 45, CT 16778 Lot No 33 Sec 45, CT 16779 Lot No 34 Sec 45, CT 16780 Lot No 35 Sec 45 and CT 16781 Lot No 36 Sec 45 but charged to the plaintiff (hereinafter referred to as 'the charged lands') under the charge, registered in the Register of Charge Presentation No 1694/86 Vol 412 Folio 86 (hereinafter referred to as 'the first charge') by public auction pursuant to ss 256 and 257 of the National Land Code 1965 ('the NLC') to satisfy the

total sum due to the plaintiff under the first charge with interest. The plaintiff is also asking for the usual ancillary reliefs which I need not mention as the controversy in this action is whether the plaintiff has the right to apply for the order for sale. The affidavit in support of the plaintiff's application affirmed by one Ng Yin Hing, the senior loan surveillance officer of the plaintiff on 15 December 1988 was filed together with the plaintiff's application. In the affidavit it was averred, inter alia, that the first charge was registered on 17 February 1986 and the charged lands were charged by the plaintiff under the first charge to secure the repayment of a loan of $20m granted by the plaintiff to one Yap Yong Seong. The said Yap Yong Seong defaulted in the payment of the loan and interest despite demands having been made by the plaintiff through its solicitors. Similar demands had also been made to the defendant to pay and as the defendant failed to respond, the plaintiff through its solicitors gave the statutory notice of Form 16D requiring the defendant to remedy the breach within the period specified in the said notice. The defendant failed to do so.

A second charge was created and registered on the same day as the first charge under Charge Presentation No 1695/86 Vol 412 Folio 87 (hereinafter referred to as the second charge) over the charged lands in favour of the plaintiff to secure the repayment of banking facilities to the limit of $4m granted by the plaintiff to one Saya Holdings Sdn Bhd. Apparently Saya Holdings Sdn Bhd failed to make the agreed payments under the agreement relating to the banking facilities granted to the said Holdings. As at 15 December 1986 the amounts due and owing to the plaintiff were:

(1) under the first charge the sum of $28,592,459.69;
(2) under the second charge the sum of $4,570,749.31.

In response to the allegations made by the affidavit of the plaintiff's senior loans surveillance officer, the defendant through its director one Lim Fap Khoon affirmed an affidavit and filed the same on 30 March 1990. It was stated in that affidavit, inter alia, that on 3 June 1989 the plaintiff had entered into a redemption agreement with the defendant whereby it was agreed by the parties concerned that the defendant was required to deliver to the plaintiff a bank guarantee providing for the payment of the sum of $18m to the plaintiff on demand on or before the expiry of six months from the date of the redemption agreement, ie on or about 2 December 1989. Acting in accordance with the terms of the redemption agreement the defendant had paid a sum of $2m to the plaintiff. The defendant was ready and willing to comply with the terms of the redemption agreement. But on 1 December 1989 the defendant was served with a writ endorsed with a statement of claim in which the plaintiff and the defendant in this action were made defendants in the writ action. More importantly the plaintiff in the writ action, one Monsia Investments Pte Ltd, succeeded in obtaining an interim injunction on 30 November 1989 restraining the defendant here from proceeding with, completing or in any manner whatsoever acting upon the redemption agreement. The interim injunction was subsequently extended until the trial of the writ action. Because of the injunction the defendant in the present case could not comply with the terms of the redemption agreement. At any rate, so said the defendant, by reason of the redemption agreement the plaintiff is precluded from instituting the present action for foreclosure of the charged lands. Alternatively it was said that the defendant was compelled to accept the plaintiff's conduct in the present case as an act of repudiation of the said agreement, the acceptance of which was subjected to the defendant's right to institute appropriate action arising from the plaintiff's unlawful repudiation of the said redemption agreement. The deponent further averred that the conduct of the plaintiff in instituting the present proceedings was tantamount to a colourable device to circumvent the injunction orders stated earlier in the affidavit.

In reply to the affidavit of the director of the defendant, the manager, Loans Surveillance/Credit Control of the plaintiff filed in another affidavit affirmed on 11 July 1990. The affidavit was in Bahasa Malaysia with an English translation of the same. The said manager affirmed that as at the case of the affidavit the defendant had failed, refused or otherwise neglected to provide the bank guarantee in respect of the sum of $18m on the due date as required under the redemption agreement of 3 June 1989. He also affirmed that as at the date of the affidavit the defendant had failed, refused or otherwise neglected to pay the said sum of $18m referred to the redemption agreement or any part thereof. He categorically denied that the plaintiff had in any way repudiated the redemption agreement and alleged that the assertions of the defendant in its director's affidavit amounted to a repudiation of the said redemption agreement by the defendant and/or in any event evinced an intention on the part of the defendant not to be bound by the same and which repudiation the plaintiff accepted. In any case by reason of the circumstances prevailing in the present case the said redemption agreement was no longer of any effect. He then proceeded to work out the amounts owing to the plaintiff under the two charges.

In his submission counsel for the plaintiff contended that because of the injunction obtained by Monsia Investments Pte Ltd in the writ action restraining the defendant and the plaintiff from proceeding with or in any manner whatsoever acting upon the redemption agreement of 3 June 1989 the said agreement had been frustrated. Counsel for the defendant on the other hand said that the said agreement was still subsisting and

suggested that if I was to examine the writ action filed in the Commercial Division of the High Court CS D1-22-251-89, I would notice that the plaintiff there (that is Monsia Investments Pte Ltd) had applied to set aside the redemption agreement dated 3 June 1989 entered between the parties to the present action.

The relevant law relating to discharge of a contract by frustration is encompassed in s 57(2) of the Contracts Act 1950 (Act 136) which reads:

> A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

It appears that the language of the section envisages two main instances of frustration — when a contract to do an act becomes (a) impossible or (b) unlawful. The frustration should be caused by some supervening and subsequent event occurring after the formation of the contract. Furthermore, it should be some event which the promisor could not prevent, as a 'self-induced frustration' does not discharge a party of his contractual obligations. But what is the test of frustration? In answer to the question an examination of the English cases may be useful. The law of frustration in England developed under the guise of reading implied terms into contracts. In the case of *Taylor* v *Caldwell*[1] Blackburn J first formulated the doctrine. The court there was dealing with a case where a music hall in which one of the contracting parties had agreed to give concerts on certain specified days was accidentally burnt by fire. It was held that such a contract must be regarded 'as subject to an *implied condition* that the parties shall be excused, in case, before breach performance becomes impossible from perishing of the thing without default of the contractor'. Again in *Robinson* v *Davidson*[2] there was a contract between the plaintiff and the defendant's wife (the defendant was agent of his wife) that the wife would play the piano at a concert to be given by the plaintiff on a certified day. On the day in question she was unable to perform through illness. The concert did not contain any term as to what was to be done in case of her being too ill to perform. In an action against the defendant for breach of contract, it was held that the wife's illness and the consequent incapacity excused her and that the contract was in its nature not absolute but conditional upon her being well enough to perform. The English law passed through various stages of development since then and the leading case of *Davis Contractors Ltd* v *Fareham UDC*[3] formulates the doctrine in its modern form. There Lord Radcliffe said (at p 729):

> Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the *circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.* (Emphasis is mine.)

The principle laid down in the *Davis* case[3] has been referred to in *Ramli bin Zakaria* v *Government of Malaysia*[4] at p 2620. There Abdul Hamid FJ (as he then was), after scrutinizing the commentaries of the author of *Chitty on Contracts — General Principles* (24th Ed) pp 658-660 on Lord Radcliffe's passage in the *Davis* case[3] (which I have cited above), made this observation:

> In short it would appear that where after a contract has been entered into there is a change of circumstances but the changed circumstances do not render a fundamental or radical change in the obligation originally undertaken to make the performance of the contract something radically different from that originally undertaken, the contract does not become impossible and it is not discharged by frustration.

From that passage Abdul Hamid FJ clearly agreed with the principle laid down in the *Davis* case[3] although it appeared to him that in the appeal before him the changed circumstances in that appeal did not render a fundamental or radical change of the original obligation.

In the present case it is important to bear in mind that the redemption agreement was created *after* the plaintiff had instituted the present action for foreclosure of the charged lands to recover the two sums of money lent to third parties of which the plaintiff had secured the charged lands as security. A cursory reading of the redemption agreement would show that the plaintiff has not, by entering into the redemption agreement, waived its rights to proceed with the foreclosure action; the redemption agreement was only meant to give a breathing space for the defendant to redeem the charged lands within a specified time. This can be seen from the following clauses of the redemption agreement exhibited as exh *X*-1 annexed to the affidavit dated 28 March 1991 of the director of the defendant.

(1) In the recitals it was stated, inter alia, that the defendant had defaulted in its obligation to the bank under the term loan and the banking facility but the defendant chargor was desirous of redeeming the charged lands from the plaintiff upon the terms set forth in the redemption agreement.

(2) The relevant terms of the redemption agreement were these:

> (1) On execution of the said agreement the defendant chargor was required to pay the plaintiff the sum of $2m pursuant to cl 1.1.
> (2) On the expiration of 15 months from the date of the said agreement (that is from 3 June 1989) the defendant chargor was to pay to the plaintiff the sum of $18m pursuant to cl 1.2.
> (3) However by cl 2 it was stipulated that:
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> On or before the expiration of 6 (six) months from the date of this agreement the chargor shall deliver to the bank

a bank guarantee issued by a bank acceptable to the bank (hereinafter called 'the guarantor bank') in such form as shall be acceptable to the bank which shall, inter alia, guarantee on demand the payment of a sum of M$18,000,000 (Ringgit Eighteen Million) to the bank on the expiry of the said bank guarantee which shall be valid for a period of 9 (nine) months from the date of its issuance.

(4) By cl 5.2 it was provided that:

the failure by the chargor to pay the balance sum of M$18,000,000 (Ringgit Eighteen Million) or to deliver to the bank the said bank guarantee acceptable to the bank in accordance with cl 2 above or the failure of the guarantor bank to pay the said sum of M$18,000,000 (Ringgit Eighteen Million) pursuant to the said bank guarantee upon demand by the bank or any other matter shall not render the sum of M$2,000,000 (Ringgit Two Million) paid on the execution hereof or any part thereof refundable to the chargor. The said sum of M$2,000,000 (Ringgit Two Million) may be appropriated at any time by the bank if it so decides in its sole and absolute discretion towards partial or total satisfaction of any one of the debts owed by YYS or SBSB or Monsia or DCSB to the bank.

(5) By cl 5.3 it is provided that:

in the event that the bank does not receive a bank guarantee acceptable to the bank within 6 (six) months from the date of this agreement, the bank shall be entitled to take such proceedings as it shall deem fit for the recovery of all sums due to the bank from YYS and/or SBSB and/or Monsia and/or DCSB under the said loan and/or the banking facilities and/or the Monsia Facilities and/or the Duto loan as if this agreement had not been entered into Provided That the sum recoverable by the bank hereunder shall be limited to a principal sum of M$18,000,000 (Ringgit Eighteen Million) together with interest thereon at the bank's prevailing base lending rate from the date that is six months from the date of this agreement until the date of full realization.

It is to be noted that the abbreviations YYS or SBSB are indicative of the borrowers in the first charge and second charge respectively and the bank spelt with a capital 'B' refers to the plaintiff bank in the present case.

From the afore-mentioned clauses three matters cannot be controverted, namely, (i) the plaintiff has not waived its right to proceed with the foreclosure proceeding; the proceeding has been suspended to enable the defendant to redeem the charged lands pursuant to the terms of the redemption agreement, (ii) the payment of the sum of $18m must be made within 15 months from the date of the execution of the said agreement (that is on or before 2 September 1990) and (iii) the defendant must, in any case, on or before the expiration of six months from the date of the said agreement, (that is on or before 2 December 1989) deliver to the plaintiff a bank guarantee enabling the plaintiff to demand payment of the sum of $18m from the bank which gave the guarantee, which was to be valid for a period of nine months from the date of its issuance (that is on or before 2 September 1990).

From the above discussions it is clear that the defendant must comply with the terms of the redemption agreement, namely, (i) the defendant was required to furnish the bank guarantee stated above on or before 2 December 1989 and (ii) the payment of the sum of $18m must be made on or before 2 September 1990. Although it has not been stated in the redemption agreement that time was the essence of the agreement it is clear that from the several clauses in the redemption agreement the plaintiff has suspended the foreclosure proceeding upon the common intention of the parties that strict compliance with the terms of the said agreement is the consideration that the plaintiff relied on in not proceeding with the foreclosure proceeding. In other words all the terms of the redemption agreement must be complied with within the time framework as stated in the said agreement, failing which the plaintiff has the right to proceed with the foreclosure proceedings initiated on 16 December 1988.

By reason of the injunction obtained by Monsia Investments Pte Ltd both the plaintiff and the defendant have been restrained from acting on the redemption agreement. The issue therefore boils down to whether under such circumstances the redemption agreement has been frustrated and the plaintiff could proceed with the foreclosure proceeding instituted under this originating summons.

Reverting to the case law to find an answer to the question I would like to refer first to the case of *Re HEH The Nizam's Jewellery Trust.*[5] The brief facts of the case that are relevant to the question of whether an injunction restraining the promisor from doing the very act that a contract requires him to do may or may not frustrate the contract are as follows.

The late HEH Nawab Mir Sir Osman Ali Khan Bahadur, the Nizam of Hyderabad by an indenture dated 29 March 1951 created a trust called HEH The Nizam's Jewellery Trust in respect of 107 items of extremely valuable, rare and priceless jewellery of exquisite design and beauty studded with emeralds, diamonds, sapphires, rubies, etc of the highest quality and purity belonging to him for the benefits of his sons, daughter, grandsons and grand-daughters. Clause 13 of the trust deed conferred upon a board of trustees comprising of five trustees the power of sale of the jewellery. Eventually the Government of India acquired 18 selected pieces of antique jewellery under the Antiquity and Art Treasures Act 1972. The remaining items of jewellery were still in the hands of the five trustees to hold on trust for the benefits of the beneficiaries. It had been represented that the beneficiaries were in very strained circumstances due, inter alia, to the abolition of the privy purse. They were therefore pressing the board of trustees to effect an immediate sale of only 37 items of the jewellery. The board of trustees accordingly

passed a resolution on 9 January 1978 to sell the 37 items of jewellery by public tender. Clauses 11 and 12 of the conditions of the sale by tender required the bidder whose tender was accepted to take delivery of the 37 items of jewellery immediately after he was informed that his tender was accepted and upon payment of the remaining 90% of the tendered amount since 10% of the tendered amount had been paid as deposit earlier. It was stipulated in the conditions of tender that if the successful tenderer should fail to pay the balance amount within the stipulated period, the sale would stand cancelled and the deposit paid by him to the trust would be forfeited by the trustees and the trustees would be at liberty to offer the same items of jewellery at the next sale. The intending bidders were allowed to inspect the 37 items of jewellery from 6 March 1978 till 8 March 1978 and they were told to give their bids before a particular hour on 9 March 1978. The board of trustees passed another resolution on 8 March providing, inter alia, that the tenders received be examined and decided by the trustees present at the meeting to be held for the purpose on 9 March 1978. The chairman of the board of trustees was admittedly not present in Bombay on 9 March 1978 when the tenders were opened by the remaining four trustees. He had to be in New Delhi on 9 and 10 March 1978 on urgent official business. However that may be, the remaining four trustees alleged to have accepted all the highest tenders for 37 items of jewellery. On 10 March 1978 the secretary of the board of trustees addressed letters of acceptance to each and every one of the successful bidders for the relevant 37 items of jewellery requiring each and every one of the successful bidders to pay the balance of the 90% of the tender price on or before 21 and 22 March 1978 and to take delivery of the items of jewellery so purchased. On 10 March 1978 one Princess Fatimah Fouzia, one of the beneficiaries and grand-daughter of the Nizam instituted proceedings under s 74 of the India Trust Act for removal of the then trustees for alleged dereliction of duty, negligence and mismanagement on their part with particular reference to the manner in which the 37 items of jewellery belonging to the trust were brought to sale. She also filed an application for temporary injunction for restraining the trustees from taking any further steps towards the finalization of the sale of the items of jewellery. On 14 March the court granted an ad interim injunction to the applicant. On 16 March 1978 one of the trustees filed a counter and prayer for vacating the injunction. He succeeded in urging the court to vacate the injunction on 27 March 1978. On 28 March the applicant filed an appeal before the Andhra Pradesh High Court and on 13 April 1978 the High Court directed that the status quo ante be maintained. It appeared that in the meantime the eighth respondent one Peter Jasin Fernande ('Fernandez') made an offer to purchase the 37 items of jewellery in one lot and also applied to be impleaded as a party respondent to the appeal. His application was allowed by the High Court upon his depositing a bank guarantee of the purchase price into court. After inspection of the 37 items of jewellery by order of the High Court Fernandez confirmed his offer and deposited the purchase price in court and was, therefore, permitted to intervene. At this stage the first respondent Princess Fatima Fouzia filed an application to withdraw her appeal but before any orders could be passed her sister Princess Amina Mirzia applied for permission to be impleaded as a second appellant in place of Princess Fatima Fouzia. The application of Princess Amina Mirzia was allowed. The High Court by its order dated 12 June 1978 set aside the alleged sale of the 37 items of jewellery by the board of trustees in favour of the successful tenderers who were the appellants in the appeal to the Supreme Court and instead approved the offer of Fernandez for the purchase of the aforesaid jewellery. In the appeals before the Supreme Court one of the questions which arose for consideration was whether there was frustration of the contract of sale entered into between the four trustees and the successful tenderers in that the ad interim injunction of 14 March 1978 made further performance of the said contract impossible to perform pursuant to 56 of the Indian Contract Act (which is in pari materia with s 57(2) of our Contracts Act 1950). In holding that the said contract of sale was frustrated by the ad interim injunction the Supreme Court said at p 28:

> Even assuming that there was acceptance of tenders by the four trustees on 9 March 1978, as alleged, in terms of the resolution of 8 March 1978, the contract was frustrated by the grant of an ad interim injunction by the Court of the Chief Judge, City Civil Court, Hyderabad on 14 March 1978. The grant of such injunction prevented the performance of the alleged contracts. The appellants could not have tendered 90 per cent of the tender amount, ie the balance of the price by the stipulated date or taken delivery of the jewellery so long as the injunction lasted.

A similar approach is adopted by the High Court of Australia in *Codelfa Construction Pty Ltd* v *State Rail Authority of New South Wales*.[6] In this case Codelfa contracted to perform within 130 weeks excavation and construction work on the Eastern Suburbs Railway in Sydney. They entered into the contract with the relevant authority on the understanding that they could carry out the work on a three shift continuous basis six days a week without restriction as to Sundays. It was also assumed that Codelfa would enjoy the authority's statutory immunity from injunction to restrain nuisance. Work started in March 1972 but in May proceedings were taken to restrain nuisances and it was held that the statutory immunity did not apply. From June 1972 Codelfa was by an injunction restrained from working between 10pm to 6am each day and later undertook not to work on Sundays. Performance of the contract was consequently delayed, and Codelfa claimed additional

costs either as damages for breach of implied warranty or on a quantum meruit following frustration of the contract. The claim was submitted to arbitration in the course of which a case was stated for the opinion of the Supreme Court of New South Wales. The decision of the Court of Appeal of the Supreme Court of New South Wales dismissed the allegation that the contract was frustrated. On a further appeal to the High Court of Australia four out of the five judges in the High Court of Australia held that the grant of the injunction restraining Codelfa in the manner of execution of the work might well have frustrated the contract and a finding on this issue lay within the jurisdiction of the arbitrator. In arriving at such conclusion two of the judges of the High Court of Australia made some useful observations. Thus Mason J said at p 380 of the reported case:

> The second objection is that the proposition does not sufficiently acknowledge the fact that the event which generally, if not universally, works a frustration, is an event which supervenes after the making of the contract, viz a change in the law which makes it impossible for the parties to execute the contract. It is not surprising that the cases commonly throw up situations of supervening impossibility caused by a change in the law — they are the more common instances of the unforeseen or unexpected occurrence. But in principle there is no reason why a mutual assumption arising from a mistaken view that an activity is immune from injunctive relief should not attract the principle of frustration. No doubt it is more difficult in such a case to show that the grant of injunctive relief was not foreseen or could not reasonably have been foreseen, but if that can be shown then the doctrine of frustration should apply. The injunction is a supervening event though it does not stem from any alteration in the law.

Aickin J said in the same appeal at p 396:

> So perhaps it would be a simpler way at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do.

Aickin J then went on to say at p 398:

> Having applied that test I am satisfied that the contract between the authority and the contractor was frustrated by the grant of the injunction prohibiting work on the tunnels between the hours of 10pm and 6am.
>
> Normally the parties to a contract proceed upon the assumption, usually implicit rather than explicit, that the contract works can be lawfully completed within the period provided by the contract or made appropriate by the nature and extent of the work to be done, or, if one prefers it, within a reasonable time. The possibility that such completion might become unlawful, in the sense that it became impossible for the amount of work to be done in the time required by the contract by the use of normal methods and in lawful working time, was not present to the minds of the parties to this contract. It may be that in other circumstances the parties might have made some express provision for possible legal action, especially in the light of the location of the site in a heavily populated residential area, or at least taken it into account in arriving at or considering the tender price. The erroneous belief entertained by the authority and communicated to and accepted by the contractor clearly led to that possibility not being contemplated by either party.

Applying the principles laid down by the aforementioned cases, I am satisfied that because of the injunction obtained by Monsia Investments Pte Ltd restraining both the plaintiff and the defendant from acting on the redemption agreement, the said agreement has been rendered impossible to perform within the terms and conditions of the said agreement. The very essence of the redemption agreement has been frustrated as the performance of the same would be a radical change of its original terms and conditions, in that the the redemption agreement was intended to suspend the right of the plaintiff to institute foreclosure proceedings against the charged lands, if and only if, the defendant was able to comply with the redemption agreement within the time stipulated in the said agreement. The effect of the injunctive order rendered the redemption agreement to be nugatory, and under the circumstances the right of the plaintiff to proceed with the foreclosure proceeding is no longer subject to the redemption agreement. In any case the right of foreclosure is a statutory right emanating from ss 256 and 257 of the NLC which cannot be taken away from the plaintiff unless the plaintiff is precluded from exercising, the right contractually. Here the contractual hinderance, namely, the redemption agreement suspending the right of the plaintiff to exercise its right of foreclosure, had been frustrated by the injunction. It follows therefore that the plaintiff has every right to proceed with its application for an order for sale of the six parcels of land stated earlier.

For the above reasons the objections of the defendant are dismissed with costs and an order in terms of the plaintiff's application by way of originating summons encl 1 will be heard on a date to be fixed.

Application allowed.

Solicitors: *Mah-Kok & Din; Philip Choong & Co.*

Reported by *Azra Moiz*